SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,
Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent.

PETITIONER'S REPLY BRIEF

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Petitioner makes the following supplementary points in reply to respondent's brief.

I.

A.

The respondent contends first that the decision in the Court below was based on sovereign immunity and, as such, is a non-federal ground which is adequate for a dismissal of petitioner's writ. This argument, however, (as we pointed out in our reply to respondent's brief in opposition to the writ) begs the question which is presented for decision in this case.

The facts in the case at bar establish a violation by the respondent of the just compensation provisions of the

Fourteenth Amendment. The question before the Court, therefore, is whether the doctrine of sovereign immunity permits a state to violate with impunity the injunctions of the Fourteenth Amendment.

On page 9 of respondent's brief, counsel quotes from *Georgia Ry. v. Decatur*, 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065 (1923) to the effect that the determination of the Georgia Supreme Court is binding upon the United States Supreme Court. In the very next sentence, however, the Court went on to say that it would determine the constitutional questions for itself, and, in fact, did strike down the determination of the State Court which it found to be in violation of the Federal Constitution.

Thus, in *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853, (1897), the Court said (169 U. S. at page 565, 18 S. Ct. at page 448):

> "It is also not open to further debate, since the decision in *Chicago, Burlington and Quincy Railroad v. Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation."

It is the petitioner's contention that the interposition of the doctrine of sovereign immunity, which results in the petitioner receiving an admittedly unjust compensation for her property, is such an action by the State Court. (We say "admittedly" because, for the purpose of this proceeding, the allegation that petitioner was to receive only one-twentieth of the true value of her property must be accepted as true.)

Respondent does not cite a single case which holds that sovereign immunity is an adequate non-federal ground for

denying jurisdiction where such a decision resulted in the deprivation of some right guaranteed by the Fourteenth Amendment. Furthermore, respondent recognizes a limitation on the State Court's right to administer the law according to its own interpretation to the extent that, "some right, title, immunity or privilege, Federally created, has been asserted and denied". (Page 11 of respondent's brief.) This is further emphasized by the first words of the quotation from *Erie Railroad v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), cited on page 10 of respondent's brief, *viz.*, "Except in matters governed by the Federal Constitution • • •" Respondent, furthermore, recognizes under Point B on page 14 of its brief, the assertion by petitioner of a Federally created right under the Fourteenth Amendment. Petitioner has, therefore, raised a substantial Federal question.

B.

On page 14 of the respondent's brief there appears an assertion to the effect that the United States Supreme Court has previously determined that sovereign immunity overrides the "due process" provision of the Fourteenth Amendment.

The cases cited by respondent in support of this contention (on pages 14 and 15 of its brief) not only do not support this statement, but respondent itself concedes (on page 15) that "sovereign immunity is no defense to a taking under eminent domain."—a right which would be asserted against a State under the Fourteenth Amendment. The only case cited by the respondent in support of its contention which even mentions the Fourteenth Amendment is *Palmer v. Ohio*, 248 U. S. 32, 39 S. Ct. 16, 62 L. Ed. 108 (1918), where the Court stated that it had

been mentioned only "vaguely and indefinitely" and consequently was not even considered by the Court in arriving at its decision.

Counsel for respondent, while conceding that sovereign immunity is not a defense to a taking under the power of eminent domain, attempts to maintain that petitioner's "lawsuit does not involve the taking of property without the payment of just compensation" (Page 15 of respondent's brief). Respondent contends that since this is an action for rescission or reformation, the subject of the contract is irrelevant (Page 16 of respondent's brief).

Respondent thus misconceives the entire nature of the petitioner's claim. The subject matter of the contract is land which was appropriated by the respondent from the petitioner without any provision for compensation being made. There is no question that property may be taken prior to the payment of compensation, provided adequate provision for the payment of just compensation is made. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 565, 18 S. Ct. 445, 42 L. Ed. 853 (1897).

After the property had been taken, a duty then devolved upon the respondent under the Fourteenth Amendment to provide just compensation to the petitioner for the property taken. In *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897), the Court, quoting from *Scott v. Toledo*, 36 Fed. Rep. 385, said (166 U. S. at pages 238-239, 41 L. Ed. at page 985):

> "After full consideration that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the State

cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself *or under delegated authority by one of the subordinate agencies of the State*, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said Amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," *and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.*' " (Emphasis supplied.)

The compensation must be agreed upon or determined by judicial inquiry, (166 U. S. at page 240, 41 L. Ed. at page 986), and must be a "fair and full equivalent for the thing taken from him by the public." (166 U. S. at pages 241, 242, 41 L. Ed. 986); *Chicago B. & Q. Ry. v. State of Illinois ex rel. Grimwood*, 200 U. S. 561, 593, 26 S. Ct. 341, 350, 50 L. Ed. 596 (1905).

The compensation which petitioner is to receive for her property was neither agreed upon nor fixed by judicial inquiry. The first cause of action set forth in petitioner's complaint states specifically that the contract as drawn does not state the actual agreement between the parties (R. 14). Therefore, whether this is a result of mutual mistake, or mistake on the part of the petitioner and delib-

erate fraud on the part of respondent, the compensation set forth in the contract is not the agreed upon compensation but is in fact only one-twentieth of the value of the appropriated land. See *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747 (1888). It must be noted here that, for the purpose of this proceeding, these allegations must be accepted as true. *Locke v. Pembroke*, 280 N. Y. 430, 21 N. E. 2d 495 (1939).

Petitioner's second cause of action, which also must be accepted as true for the purpose of this proceeding, alleges deliberate fraud on the part of the respondent (R. 15). Compensation fraudulently determined is not "just compensation" and, *a fortiori*, fraudulently determined compensation in the amount of one-twentieth of the "fair and full equivalent for the thing taken" is not just compensation.

The remedy of the petitioner, therefore, was to apply to the Courts to either rescind the agreement or to reform it according to the actual intent of the parties to express the true consideration which had been agreed upon. The act of the State Court in sustaining the defense of the sovereign immunity of the respondent, in effect, bound the petitioner to accept the "unjust compensation" set forth in the agreement and therefore operated to deprive petitioner of her property without due process of law. *McCoy v. Union Elevated R. Co.*, 247 U. S. 354, 38 S. Ct. 504, 62 L. Ed. 1156 (1918).

> "* * * it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that Amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in the name and for the

> State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or invade it.'" *Chicago B. & Q. Ry. Co. v. Chicago*, 166 U. S 226, 233, 234, 17 S. Ct. 581, 583, 41 L. Ed. 979, 983, 984 (1897).

Respondent contends, on page 18 of its brief, that the immunities granted to the states by the Eleventh Amendment cannot be deemed forbidden by the Fourteenth. In this connection, it is sufficient to point out that the Fourteenth Amendment was passed subsequent to the Eleventh Amendment and after a great civil war had been fought over the rights of the state, and said amendment is by its terms a direct limitation upon the states. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913).

On page 19 of respondent's brief, the contention is made that the essence of petitioner's complaint is that she agreed to accept a wholly inadequate sum as compensation. Nothing in the pleadings sustains this contention. The allegations in the pleadings in fact are to the contrary in that the written agreement never contained the agreed upon compensation. *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747, 750 (1888).

Respondent further contends (at page 19) that as long as compensation is made or provided for, no matter how small the amount may be, no substantial Federal question is presented. In the cases cited by the respondent in support of this contention, full and complete hearings had been held. Thus, in *Appleby v. Buffalo*, 221 U. S. 524, 31 S. Ct. 699, 55 L. Ed. 838 (1910), the New York Court of Appeals had expressly considered the facts of the case and determined that the owner was not entitled to more

than the nominal damages that had been awarded by a board of commissioners. Since credible evidence to that effect had been introduced (unlike the instant case), the Court held that the petitioner had received a proper hearing during which he excepted to no errors of law, and therefore he could not complain that his compensation was not just. This is far different from saying that any compensation is "just" compensation. The distinction between that case and the instant one is transparent. There has been no claim or evidence that the value of petitioner's land is as low as the amount specified in the contract. In fact, since this appeal arises out of a motion to dismiss, it must be conceded that its value was the amount alleged, *viz.* twenty times the amount in the contract. Considering this point, and the lack of any review of the amount of the contract, the inapplicability of *Appleby, supra,* becomes evident.

There is no difference between the execution of a contract by fraud and the execution of a contract by force. In either event, to limit the compensation of the petitioner to the terms fixed by such a contract would be violative of due process.

II

A.

In Point II of its brief, the respondent takes great pains to show the identity of the Thruway Authority with the state (at pages 20-23). It is, however, equally possible to set forth numerous sections of New York law which substantially differentiate it from the state.

> "We note, simply for purposes of illustration—for it by no means exhausts the list—that the Authority is expressly empowered to 'make contracts,' 'acquire

> • • • real property', 'borrow money and issue [its own] negotiable • • • obligations' without public referendum and, significantly, 'accept any gifts or • • • grant of funds or property • • • from the state of New York' (Section 354) and become 'indebted to the state' (Section 357). The notes and bonds issued by the Authority are its primary obligation, the State's obligation being merely that of a guarantor (Section 366), and only to the maximum amount of $500,000,000 (N. Y. Const., art. X, Section 6). If, as asserted, there was an identity between Authority and State it is difficult to perceive how the Authority could receive gifts from, or become indebted to, the State and, quite obviously, the latter's guaranty of the Authority's obligations would be superfluous and unnecessary. Finally, we would add that traffic control upon the Thruway is exercised by the Authority and not by the State through its Traffic Commission (Public Authorities Law, Section 361).
>
> As would, of course, be expected, the cases confirm the conclusion that a public authority enjoys an existence separate and apart from the State, even though it exercises a governmental function (see, *e.g.*, *Malone v. State of New York*, 1 N. Y. 2d 837; *Pantess v. Saratoga Springs Auth.*, 255 App. Div. 426), and nothing decided or said in *Easley v. New York State Thruway Auth.* (1 N. Y. 2d 374) detracts from the force of what we have written." *Plumbing, Heating, Piping and Air Conditioning Contractors Association, Inc. v. New York State Thruway Authority*, 5 N. Y. 2d 420, 424, 185 N. Y. S. 2d 534, 536-537 (1959).

The respondent, in order to reinforce its argument regarding the close relationship of the state, cites many cases in support of its contention that it is engaged in a governmental function (at pages 24-28). However this may be, there appears to be little value in introducing into this area the governmental vs. ministerial distinction which has plagued the Courts over the years. Borchard, *Government Liability in Tort*, 34 Yale L. J. 1.

Although New Jersey, for example, held in *Muszynski v. New Jersey Turnpike Authority*, 27 N. J. Super. 248, 99 A. 2d 326 (1953) (cited on page 26 of respondent's brief) that the Turnpike Authority was engaged in a governmental function, the law in New Jersey is clear that the sovereign immunity of the state does not extend to the Turnpike Authority.

> "It would seem that in all justice such authorities should generally not be afforded the highly special immunities of the State acting in its sovereign capacity." *Taylor v. New Jersey Highway Authority*, 22 N. J. 454, 470, 126 A. 2d 313, 322 (1956).

The confusion which results from attempting to delegate the immunity of the state to other agencies is apparent from respondent's own brief. Thus, at page 30, respondent quotes from *Matter of Hamptonburg School District*, 303 N. Y. 484, 104 N. E. 2d 866 (1954) which states that a municipality is possessed of the same immunity from suit as the state,* and on page 34 of its brief, respondent quotes from *The Onteora*, 298 Fed. 553 (S. D. N. Y. 1923), which indicates that it is not. This confusion, coupled with the added difficulty of opening the door to the governmental vs. ministerial distinction mentioned previously, makes it especially important that this Court limit the doctrine of sovereign immunity to the state and not to any of its agencies or subdivisions.

The dangers inherent in the extension of the doctrine of sovereign immunity to a Public Authority were pointed up in a note which discusses the *Benz* case (the case at bar) and *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961) which followed it. "As a result of these decisions the public corporation is put in the

* *Cf.* Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 36 L. Ed. 766 (1890).

unique position of having all the advantages of government and none of the disadvantages of a private body. This presents a fertile area for sovereign irresponsibility." NOTE, *The Public Authority and Sovereign Immunity*, 11 Buffalo L. Rev. 57, 60 (1961).

Petitioner does contend, however, that even if the state could extend its immunity to the public authority, it is not immune from a claim for a deprivation of a right guaranteed by the Fourteenth Amendment.

On page 32 of its brief, respondent attempts to explain away the reference in Nichol's *Law of Eminent Domain* to the effect that a release obtained by fraud may be voided, by agreeing to the principle, but stating that the respondent is not amenable to suit. It should be noted that the reference was taken from a work, and a section of that work, which deals with the taking of private property by a public body.

Larson v. Domestic & Foreign Finance Corp., 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), which is discussed on pages 36-37 of respondent's brief, did not involve the deprivation by a state of a right guaranteed by the Fourteenth Amendment. Neither the majority opinion (as is indicated at page 25 of the petitioner's brief) nor the dissent, set forth the proposition that a state may, with impunity, deprive its citizens of such rights. Indeed, in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913), the concern was whether the action complained of was sufficiently connected to the state so as to come within the proscription of the Fourteenth Amendment. In the light of the history of the Fourteenth Amendment, it is difficult to conceive of the doctrine of sovereign immunity being interposed to avoid relief for a violation of its guarantees.

B.

Respondent's final contention is that alternative relief is available to the petitioner in the Court of Claims. It states first that petitioner might bring an action for deceit. This contention was made before the Court of Appeals and, in spite of this, that Court held petitioner to be without remedy. A cause of action for deceit clearly does not suffice for the petitioner. It not only fails to take into consideration that portion of petitioner's claim which involves the mutual mistake of fact, but it also fails to satisfy the basic constitutional objection to the taking of petitioner's property without the payment of just compensation.

Respondent then goes on to state that petitioner is authorized to sue in the Court of Claims and that Court has power to grant equitable relief. The New York Court of Appeals in *Psaty v. Duryea*, 306 N. Y. 413, 416, 118 N. E. 2d 584, 586 (1954), stated clearly, "It seems to be conceded that the Court of Claims has, under Section 9 of the Court of Claims Act, no jurisdiction to grant strictly equitable relief, but to award money damages only against the State, in appropriate cases." Furthermore, such a possibility was not even mentioned by the Court of Appeals in the instant case, but was excluded when that Court specifically held petitioner to be "without any remedy".

Lastly, respondent asserts (at page 40) that the statute of limitations has expired and that this was "necessarily the basis of the Court's statement." This contention by respondent is wholly unsupportable. The meaning of the Court of Appeals' statement that the petitioner was without any remedy was explained fully and completely in the case of *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961), where the Court stated (10 N. Y. 2d at page 203, 219 N. Y. S. at page 9):

> "Decisions such as Benz v. New York State Thruway Authority, 9 N. Y. 2d 486, 215 N. Y. S. 2d 47, are expressive of a constitutional and legislative policy that public authorities should be subjected only to those procedures which have been specifically mandated. '[T]here is no jurisdiction in any court of any suit against [an Authority] except as the Legislature has in terms created such jurisidiction' (*supra*, 9 N. Y. 2d at page 489, 215 N. Y. S. 2d at page 48)."

This conclusion followed logically from the case of *Easley v. New York State Thruway Authority*, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956), where the Court stated (1 N. Y. 2d at page 378, 135 N. E. 2d at page 574):

> "Because of sovereign immunity, none of the existing courts could take jurisdiction over such claims unless the Legislature should so permit."

The Court of Appeals in the *Benz* case, having found that there was no remedy mandated by the legislature against the Thruway Authority to grant petitioner any relief, consequently found that the petitioner was "without any remedy". NOTE. 11 Buffalo L. Rev. 57.

The statement by the Court of Appeals that petitioner is "without any remedy" is absolute and unqualified under the present state of the New York Law, there is no support whatever for respondent's contentions that other remedies are available. It is petitioner's contention, however, that the conclusion of the Court of Appeals in the *Easley* case, *supra*, is in error to the extent that it acts to deprive the petitioner of her rights under the Fourteenth Amendment.

In footnote 16 on page 38 of respondent's brief, counsel recognizes that the New York State Supreme Court had jurisdiction over the Thruway Authority in tort actions until the New York State Legislature conferred exclusive jurisdiction for such actions on the Court of Claims by Section 361-b of the Public Authorities Law.